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In The

Supreme Court of the United States

LEONARD J. KERPELMAN,

Appellant

vs.

MARVIN LAND, ET AL.,

Appellees

October Term 1984

No.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LEONARD J. KERPELMAN
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In Proper Person

1 copy

1. (a)

Questions Presented For Review

1. Did the Fourth Circuit Court of Appeals in this case improperly dismiss, on the basis of "judicial immunity", a case against members and staff of the state "Attorney Grievance Commission" in direct contradiction to the May 14, 1984 decision of this court in the case of Pulliam v. Allen, 52 LW 4525? The Petitioner, like Pulliam, had sought future injunctive relief, counsel fees and damages against a judicial official in his non-judicial capacity; and what may or may not be quasi-judicial other parties for malicious acts under color of their disciplinary commission membership. Analogous to Allen's acts (in Pulliam v. Allen) under color of her judicial office.

The gravamen of the complaint below was the filing and knowing pursuit of an

entirely non-meritorious ethical complaint against the Petitioner to harass him, chill the vigor of his professional activity in the future, or acquire his disbarment. The action, as in Pulliam, was under §1983 of the Civil Rights Act of 1968. Moreover, the insubstantiality or harassing nature of the complaint was never denied by the defendants. The complaint, it was alleged was angrily dismissed out-of-hand, unanimously, by a three member "review board," not the Respondents.

After an "informal brief" was filed, the Fourth Circuit, immediately after Pulliam was decided, requested "formal" briefing upon the Pulliam questions, and additional "formal" briefing upon the question of whether the grievance commission defendants had any judicial immunity at all, even from

ordinary or punitive damages. These were reasonable questions after Pulliam. However, thereafter, inexplicably, the case was dismissed by the Fourth Circuit in a one paragraph Per Curiam Opinion (App. 3) which never mentioned Pulliam or judicial immunity but simply referred back to the lower court's reliance on Younger v. Harris, 401 U.S. 37 granting judicial immunity.

The question, then, is whether, by virtue of Younger v. Harris, the defendants are saved from the consequences of what, in the posture of the case (it having been decided on a Motion to Dismiss), is their ill and unconstitutional conduct; or whether, on the other hand, the Petitioner is to be allowed to practice law without fear of unjust and malicious harassment by the Respondents either into madness, or out of the legal profession?

Younger, the Petitioner believes he will show infra, is totally misapplied to this case because this case, quite simply, does not concern an "on-going" prosecution, but one which has run its course to its end! Which clearly and explicitly, by Younger's unambiguous language, excepts it from Younger.

2. Doe repression of Free Speech give a particular right to damages under Pulliam?

3. Are the disfavored, or those with unpopular views or views offensive to those in authority to be readily prevented from practising law; or does Pulliam limit such practices:

The Petitioner contends that the case

has economic, class and ethnic overtones which it should not have, and he seeks, as Pulliam sought, to present that contention ultimately to a jury. Should this have been ultimately permitted?

1. (b)

All Parties Below

The parties in the Fourth Circuit Court of Appeals, all represented by the office of the Attorney General of Maryland, are: Melvin Hirschman, J. Martin McDonough, Jr., William Walsh, and Henry J. Myerberg, staff and administrative officials of the "Attorney Grievance" body, who were in charge of and performed its daily work; the following appointed members of the Attorney Grievance Commission of Maryland (the "board" of the grievance body): George D. Solter, William A. Franch, William Wells Beckett, James J.

Cromwell, R. Taylor McClean, Raymond S. Smethurst, Jr., Walter E. Balck, Jr., Florence Udell, William Walsh, Felton E. May, David B. Mitchell, Charles H. Reed, Elizabeth Tennery, Howard Wood, III.

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Opinions Reported

The Per Curiam Opinion of the Fourth Circuit Court of Appeals is unpublished. It appears in full at A 1 and A 2. That Court's denial of the Petitioner's Petition for Rehearing is unpublished, appears at A4.

Grounds for Invoking the Jurisdiction of the Supreme Court

(i) and (ii)

Judgment was entered in the United States Circuit Court of Appeals for the Fourth Circuit in Case No. 84-1737 (this case) on January 24, 1985, the judgment being dated the same day; a Petition for Reconsideration was timely filed, which was denied by an Order dated February 20, 1985 entered the same day.

The Civil Rights Statute Involved

The Petitioner brought an action against the Respondents in the federal district court under 42 U.S.C. Section 1983 (1976 ed., Supp. V):

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunites secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
> (R.S. § 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

Also, the Civil Rights Attorney Fess Awards Act of 1976:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 (20 U.S.C. 1681 et seq.) or title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq,), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
>
> (R.S. § 722; Pub. L. 94-559, § 2,

Oct. 19, 1976, 90 Stat. 2641; Pub. L. 96-481, title II, § 205 (c), Oct. 21, 1980, 94 Stat. 2330.)

Also, Chapter "BV" of the "Maryland Rules," covering "Attorney Discipline". These are too voluminous to include here so are printed in the Appendix at pp. A 49 - A 59. U. S. Constitution, Amendment I, Free Speech.

Maryland Rules BV2-11 am 1228 are found in the Maryland Code. These are lengthy and appear in the Appendix at A 49 to a 59 .

STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

The Petitioner is an attorney. He had been suspended from practice for three years. That maladventure is no part of this Petition. However, no attainder of blood was imposed and he is still as much under the protection of the Bill of Rights as the next man, which is one of the points of this case.

During the Petitioner's suspension and after having held back the prosecution of a claimed "grievance" for a year and a half, the defendants did prosecute it. It was an entirely meritless "grievance" (A 41). In the federal District Court complaint this "grievance" was alleged to have been entirely baseless and to have been prosecuted nevertheless in an expected

successful endeavor to get the Petitioner disbarred (A 40). In fact, the substance of it came to be called "A piece of (unprintable)" by one lawyer member of the reviewing panel (A35). The unanimous three person panel found the "grievance" not worthy of a hearing and it was dismissed (A33-4).

The case below, on which the "grievance" was based, ultimately involved two persons named Oxley, and bearing the same given name, "Gail". There was a "Gail" Oxley, mother; and a "Gail Oxley, son.

The case was a divorce and custody matter in the Circuit Court for Baltimore County wherein Kerpelman, the Petitioner, was attorney for Oxley(son), Kerpelman

contended that he had been told by Oxley (son) that if the opposing party wished to take Oxley(mother)'s deposition, that he, Kerpelman, was to represent Oxley (mother) at the deposition. This was unrefuted. Kerpelman had also received a letter from Oxley(son)'s wife, in addition to the oral instructions from Oxley(son), directing him to perform the representation of Oxley(mother).

The deposition was scheduled. Whereupon Kerpelman tried to reach Oxley(mother) by phone, and could not. He then applied to the court for a postponement --it was never disputed that he had a valid schedule conflict --by contacting the Defendant Land, who was the state circuit court judge in the case at the time stating, as to the Oxley(mother) deposition, <u>that he represented her</u>.

He could just as well have made the request on the basis of representing Oxley(son), who was a party; who was, therefore entitled to representation at the deposition. It appears from all there is that it was a mere matter of random choice as to whether mother or son had been named by Kerpelman.

After an explanation had been requested of Kerpelman, which he gave, including the oral and written instructions the attempted telephone contact, nevertheless, Land filed a complaint. The complaint was that Kerpelman had "defrauded" the court in seeking the postponement.

These "Oxley" facts are all, it is believed, contained in the letters extracted at A38-9 from the file in Circuit Court Case 92369 Equity, Baltimore County.

So the "grievance", as has been said, was thrown out, even thought the panel which did so was alleged to have been hand picked (A 42) by the defendants. It appears that a jury could readily find it had no merit whatever.

The Petitioner brought suit in the United States District Court for the District of Maryland under § 1983 of the Civil Rights Act of 1964 and the Attorney's Fees in Civil Rights Cases Act of 1978. He sought damages, punitive damages and a prohibitory injunction against the bringing of future baseless suits founded on malicious motivations. These he said would cause him to spend all of his professional time defending against meritless "grievances" and would effectively prevent him from practicing law (A 3-4). The

suit was brought against the operating staff of the Attorney Grievance Commission, and also against all of the commission members themselves, that is the "board" members. Incumbency changed during the course of the prosecution of the "grievance" against the Petitioner and both groups were dued as well as Judge Land who had filed the "grievance". The board members all defended on the grounds that they had not acted maliciously, that they knew nothing of what the staff members were doing and on "judicial immunity". The staff members and Ludge Land on grounds of "judicial immunity" and that they had acted reasonably.

By the Maryland Rules of Procedure under which they operated the "board" members not only had the specific duty to appoint and supervise the head of the

staff (Rule BV3b(1); page A 49a) but to "evaluate the effectiveness" from time to time of the system they were supervising (Rule BV3(viii); page A 49a).

The District Court judge, acting on motions to dismiss dismissed the Petitioner's complaint summarily, upon the pleadings. He did so just a matter of days before this court decided Pulliam v. Allen, U.S. , 52 U.S.L.W. 4525 (April 23 and May 14 are the dates). The dismissal was based on judicial immunity of all parties (except Mrs. Oxley and her husband who had never been served) and on the abstention doctrine set forth by this Court in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, for criminal and quai-criminal state prosecutions.

When the decision in Pulliam v. Allen, supra, was handed down, however,

the Fourth Circuit Court of Appeals, under its optional rules, immediately requested formal and more elaborate briefing than had been submitted, on two questions:

> (1) The right of the Petitioner to claim for attorney's fees and costs in light of Pulliam, and
>
> (2) The question of immunity from damages --at all --of the Attorney Grievance Commission staff and board members (A 2-3).

However, after highlighting these Pulliam questions by its request for briefing, the Fourth Circuit then, in due time, issued an unpublished three paragraph Per Curiam Opinion (A 2) merely reverting back to the grounds of dismissal of the district court and adding as a new ground, that the allegations of "conspiracy" in the Petitioner's complaint were, "conclusory".

The Petitioner, speaking for himself, was surprised. There clearly seems to be a Pulliam conflict.

SUMMARY OF ARGUMENT AND OUTLINE OF ARGUMENT

Essence of the Summary

Pulliam required reversal by the Fourth Circuit; its failure to do so places it in conflict with that decision of this Court.

Summary of Argument

Petitioner brought a civil rights action against Respondents for misuse of complex and expensive attorney "discipline" proceedings to maliciously have him disbarred. The lower court dismissed on a motion on grounds of a broad judicial immunity and on Younger v. Harris abstention from "ongoing" quasi-criminal proceedings. Then Pulliam v. Allen was decided holding that "judicial immunity" offers only limited protection in a civil rights action. The Fourth Circuit immediately posed two briefing questions indicating it was aware of the effect of Pulliam. But in its two --substantive --paragraph Per Curiam Opinion the Fourth Circuit, surprisingly failed to discuss its own questions and

merely referred back to the pre-Pulliam lower court decision. It added a ground of its own also, namely that the complaint attempted to charge "conspiracy" but only by "conclusory" allegations.

The Argument is that the Fourth Circuit has patently placed itself in conflict with Pulliam; that Younger is entirely inapplicable because the prosecution against the Petitioner was not "ongoing" but had ended long ago; he now sought subsequent relief only, as permitted by Pulliam; that the Fourth Circuit was factually incorrect about the suit being a "conspiracy" suit and about "conclusory" allegations; numerous specific acts and failures to act stated in the Complaint are pointed out; and the argument further is, that the Maryland "disciplinary" procedure is so notably at odds with constitutional requirements that it comes within that exception to Younger anyway; that if Younger still applies after Pulliam this case is clearly within the Younger exceptions; and finall that the Commission's claim to be in the business of protecting the public as a reason to continue "judicial immunity" is cast into much doubt by a statistical table in the Appendix which itself suggests other purposes.

OUTLINE OF ARGUMENT (Recap from Table of Contents)

I. A Distressing Compilation (Table A)

I Pulliam

III. Reasons for Rejection by the Fourth Circuit

IV. Rebuttal to Reasons for Rejection by Fourth Circuit

A. Younger v. Harris
Applies to Ongoing Prosecutions only

B. "No Hope of Success"

C. The Presumption of Sainthood

D. "The Petitioner Caused the San Francisco Earthquake"

E. Allegations of Conspiracy; "Conclusory" Language

F. On the Constitutional Protections Requirement of Younger/ Middlesex

V. CONCLUSION

A. Pulliam Must Govern

B. Some General Considerations

VI. EPILOGUE. The Unique Pursuit of this Petitioner

ARGUMENT

A Distressing Compilation (Table A)

The Petitioner was a sole practitioner attorney until suspended from practice. (He has been reinstated now.) What does being a small practitioner have to do with this case? The Appendix contains a summary of information obtained from the current West's Maryland Digest Pocket Part on Attorneys-at-Law. See A 64 - A 65 and particularly Table A, page A 36 . It shows that of the sixty one cases brought to the Maryland Court of Appeals by the Respondents and their commission, from its inception in 1977, to the present time, excluding only cases involving alcoholics and cases involving conviction of crimes, all but one appear to be against small practitioners, to one familiar with the Maryland bar. That

is, 60 out of 61 non-criminal, non-alcoholism disciplinary cases were against the little people in our industry. This could be wrong, but if so the Respondents will offer a correction.

And as to Jews: Possibly 20 out of the 61. One-third. Since these are the same cases, Jews of large firms are excluded from the statistics. An examination of a Maryland Lawyers' Directory indicates that these large firm Jewish persons are considerable in number.

Therefore the ethnic-Jewish-name statistic is uncomfortable. It appears to be perhaps double the ratio of small practitioner Jews among all small practitioners. This is unpleasant stuff. But in our demoncracy we do it. It is emphasized that the Jewish ethnic names statistics are subject to some serious criticism. The analyses

are admittedly loose and based on more subjective judgment than makes for a nice certainty. But let us at least be suspicious, for later this argument discusses the presumption of sainthood which the District Court judge made for the Respondents.

So much for that. It is shaky on the ethnic question.

However, anyone knowledgeable about firm personnel in Maryland, checking against Martindale-Hubbell can see that the small practitioner statistic is unquestionably monstrous.

Petitioner is,among other things a small practitioner and, he will mention, a troublemaker. See counsel note to the School Prayer Case 374 U.S.203. He was Murray's lawyer. He has been involved in many environmental and preservation cases.

(E.g. The Wetlands Case, Kerpelman v. Board of Public Works 261 Md. 436; The White Clouds Mountains Case (Md. District Court). He has written a book, more recently, "Divorce; A Guide for Men" (ICARUS Press, 1983) which castigates the legal system in a bad area. The Petitioner plays, he himself would say, openly, without inhibition, and always honestly.

In thirty years of practice, his professional record was unblemished, until the Maryland Attorney Grievance Commission was established. So all-in-all it may not be so illogical to believe that the purposeful filing of the false "grievance" alleged in the complaint may really have happened.

The District Judge seems to have invented a Presumption of Sainthood, however, to save them. That is not good law.

II
Pulliam

The holding in Pulliam v. Allen, 52 LW 4525 is entirely unequivocal. The syllabus states:

> . . .(R)espondents brought an action against Petitioner in Federal District Court under 42 U.S.C. § 1983 (1976 ed. Supp. V), claiming that Petitioner's practice of imposing bail upon persons arrested for non-bailable offenses under Virginia law and of incarcerating those persons if they could not meet the bail was unconstitutional. The court agreed and enjoined the practice, and also awarded Respondents costs and attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976. Determining that judicial immunity did not extend to injunctive relief under § 1983 and that prospective injunctive relief properly had been awarded against Petitioner, the Court of Appeals affirmed the award of attorney's fees. Held:
>
> 1. Judicial immunity is not a bar to prospective injunctive relief against a judicial officer, ... acting in her judicial capacity. . . .
>
> Congress intended § 1983 to be an independent protection for federal rights, and there is nothing to suggest that

> Congress intended to expand the Common Law doctrine of judicial immunity to insulate state judges completely from federal collateral review.
>
> 2. Judicial immunity is no bar to the award of attorney's fees ... and the legislative history confirms Congress' intent that an attorney's fee award be made available even when damages would be barred or limited by immunity doctrines.

Yet, in spite of this clear language and in spite of the Fourth Circuit's own original inquiry, asking that the question of immunity for the Grievance Commission be formally briefed, (A) the Fourth Circuit, which was aware of Pulliam, upheld the lower court's decision against the Petitioner, though that lower court decision had been made before Pulliam was decided.

Moreover, it can be by no means foregone that the Maryland Attorney Grievance Commission is either a "judicial" or a

"quasi-judicial" body. It has no statutory sanction.[1] It is ostensibly an independent body whose members are paid out of the Maryland "client's Security Trust Fund" (Maryland Rule 1228, A 58), which is a fund, again set up by the Maryland Court of Appeals on its own, requiring a payment (currently $54 per year) by all practicing lawyers as a pre-requisite to practicing. Again, there is no Legislative sanction --and the levy looks suspiciously like a tax. Only the Legislature can tax. But that is matter for a different brief. --Nevertheless, these funds are a private collection. The

---

[1] The "Commission" was set up in Maryland sua sponte under the "rule-making" power of the Maryland Court of Appeals without other Legislative sanction --nor any state constitutional sanction, and in spite of a prior history showing that for 200 years the power of regulating the bar resided in the Maryland Legislature. There are no Maryland cases recognizing any such "inherent" power. None.

Commission itself, too, is a private body. There is no electoral control, no Executive control, no Legislative control and there is a pretension that there is no control by the judiciary. In fact, the judiciary strictly controls the appointments (A49-52) and so to say it has no control would be to say that the Grand Armeé was independent of Napoleon. But private body it is.

It is difficult to hem together any theory by which a private body could have "judicial" immunity.

Of course, this Court stated in Middlesex that these committees can be an "arm" of the judiciary. But an "arm" is one thing, a "hammer" is another. Later discussion herein in this Petition concerns the evil use which may befall these committees, or "commissions".

The Court may wish to speak to this, or to simply reverse in this case as being in direct conflict with the principles already set forth in Pulliam.

III

Reasons for Rejection By The Fourth Circuit

The Fourth Circuit rejected the appeal and upheld the District Judge based on Younger v. Harris; and on "judicial immunity"; and on the theory that the Petitioner had sought to allege a conspiracy but failed by not including specific allegations of action or nonfeasance.

IV

Rebuttal to Reasons for Rejection By the Fourth Circuit

A.

Younger v. Harris Applies to "Ongoing" Prosecutions Only

It was error to apply Younger v. Harris, ibid. for as is explicitly repeated in Middlesex v. Garden State, Younger v. Harris applies only where the remedy sought is the prohibition of an ongoing prosecution.

In the present case there is not an ongoing prosecution.

It is true that a prohibitory injunction is sought but not of any "ongoing" or "pending" prosecution whatever. The injunction sought was to prohibit future and mala fide baseless prosecutions only, and only if they should ever begin.

There can be no question but that "ongoing" is a necessity for the operation of Younger. Middlesex v. Garden State discusses Younger in great detail and makes that statement total of five times:

At 2515, 2516, 2522, 2524 and 2525 of 102 S.Ct.

Strangely, the "ongoing" case the District Judge referred to was Oxley. The Oxley "grievance". But that was long over. It was ended by the Soudry letter of Rosalyn Soudry who was chairman of the "grievance" inquiry panel. The letter is at A 33 .

The District Judge seems either to have missed "ongoing" and "pending" in Younger and Middlesex, or he misunderstood as to Oxley being closed.

B.

"No Hope of Success"

Perhaps at this point it would be appropriate to rebut a second misapprehension of the District Judge (since the Fourth Circuit stated it was relying on that).

The District Judge stated, in effect, that since the Petitioner had already been suspended from the bar for his evil practices that it could not be said that the Grievance Commission's prosecution of the Oxley "grievance" was "without any hope of success" (see A 29).

This however, is neither good physics, nor good philosophy, nor good logic.

Students of the sciences know that a coin which has been flipped and has come up tails twice is not more likely than before to come up heads the third time. Likewise each prosecution of the Petitioner is a separate entity, its bona fides or mala fides not to be judged by what went before. Nor is a Grievance Commission under any lihter duty to a felon or a criminal than it is to a Sunday School teacher. That is basic Jeffersonian

American law and the question of "no hope of success" would come up only as measure of whether a prohibitory injunction against baseless charges was being violated.

In any event Younger does not, even by the District Judge's language, prohibit all prohibitory injunctions of prosecutions. It at least permits prohibition of those with "no hope of success".

Like the Oxley one against the Petitioner.

Or at the very least, it was erroneous for the District Judge to rule that because of the Petitioner's past evil life there is no such thing as a "no hope" prosecution against him.

American Law does not recognize the concept of "outlawry".

C.

The Presumption of Sainthood The First Amendment Aspect and Damages

The Presumption of Sainthood which may have existed generally for disciplinary committees before Pulliam was decided, is gone now.

It should be gone for damages, too, when the First Amendment is invoked.

The District Judge, speaking before the Pulliam decision, had noticed that the case had a First Amendment connection, but he overcame it. It presents a conflict with another circuit.

In the decision, the lower Court discussed immunity:

> "The rationale of granting immunity to attorney disciplinary committees ... is basically ... that they are the 'arm of the courts' ... (A).

The Opinion then, in three closely stated pages contains flattering references to

> "perform(ing) a function which traditionally belongs to the judiciary ..."

and that,

> "judges have delegated ..."

There are other phrases in dicating the praiseworthiness of being the object of judges' affections.

Nevertheless, a strain is present in the reasoning. One is constantly aware of it as the Court seeks to avoid having to accept as true the allegations of the complaint, as the law requires.

In the final analysis, the problem is solved only by a Presumption of Saithood, or a leap of faith; or by comparing apples and oranges:

> Surveying the circuits, as to money damages, the District Judge goes on to find (A) that the Fifth, Sixth, Eighth, Ninth, and Tenth Circuits grant
>
> "Absolute immunity ...under 1983..."

However, none of these Circuit Court cases, involved a First Amendment question.

It must also be noted that farther forward in the Opinion (A19,24) the District Court points out that this case, on the pleadings, does involve the First Amendment:

> "There are First Amendment overtones ... Kerpelman has alleged ... that members of the Commission were aware of an article he published critical of the courts and the organized bar, and that the pursuit of the charge against him was motivated by the bar's desire to suppress such criticism."

The District Court then says, however, that only the Second Circuit has ever held that there are

> "some circumstances (notably, those involving ... First Amendment freedom of speech) in which absolute immunity should not be granted ..."

The the leaps of faith. Comparing the apples cases with the orange cases (that is, the non-First Amendment cases with the one Free Speech case) he opts for the "majority rule (as) more persuasive under the circumstances."

What "circumstances"? There was only one Free Speech Case. One would think that that one was a majority! One must conclude that it was the Presumption of Sainthood which really carried the reasoning forward; over apples, over oranges, over Thomas Jefferson's blessed head, over the First Amendment.

And yet, it is respectfully urged

even all of that may have become moot with Pulliam; for if a prohibitory injunction, counsel fees and costs judgments may be passed against judges, should not greater sanctions --damages and punitive damages --be allowed agaisnt non-judges who have, if the allegations of the complaint here be true, broken faith with the trust which their appointment to office placed upon them? This Court always has a special concern for the First Amendment. There is a concern as well when Circuits disagree. The Fourth Circuit adopted the Opinion of the lower court in its own decision (A 3), hence is in conflict with the Second Circuit case on the question of the availability of damages for the chilling of First Amendment rights by disciplinary committees.

On either basis, but particularly

on the First Amendment basis, it is a question which, it is respectfully suggested, should be settled.

The Second Circuit case referred to is Dacey v. New York County Lawyers' Assn, 423 F2d 188, cert. den. 398 U.S. 929 (1969).

D.

"The Petitioner Caused
The San Francisco Earthquake"

What if, for example, the defendants in the future receive a complaint that the San Francisco Earthquake was instituted by the Petitioner.

Is he to be debarred from seeking Civil Rights Action redress, including a prohibitory injunction, because the Respondents succeeded in the past in having him suspended from practice?

Younger, certainly, does not go that far. The District Judge said it did and the Fourth Circuit adopted his reasoning.

It is certainly not inconceivable to the Petitioner that he will be charged with that someday soon. It is no different in substantive support than the Oxley charge.

Petitioner had in Oxley asked for a post-

E.

Allegations of a Conspiracy "Conclusory" Language

The Fourth Circuit was under a mis-apprehension, albeit due to the actual use of the word "conspiracy" on a single occasion in the original District Court complaint. It is mere surplusage however. No conspiracy is alleged. What is alleged is conscious perfidy on the part of the Maryland Attorney Grievance Commission's operating staff and (a)impermissable non-knowledge of what that staff is doing, on the part of commission members. (That is, the "board" members) or, (b)knowledge

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ponement based on his alleged belief that he represented a non-party at a deposition. He in fact did represent a party and could have sought the postponement anyway. He was charged with committing a fraud on the Court. See Statement of the Case.

of what is being done by the staff and no steps taken to halt its unlawful activities; or, (c)lack of knowledge of what one should know about after accepting the responsibilities of the position of "board" member.

Some of the allegations found in the complaint as to both the "board" defendants and the "operating staff" defendants, which are non-conspiratorial allegations and in specific, not "conclusory" language, are the following:

In paragraph Four:

> (The operating staff of) the Maryland Attorney Grievance Commission ... approved, directed and condoned all of the acts (of the operating staff) ... ,

Paragraph Five:

> (The operating staff), with the direct or implied consent of the other defendants determined to illegally injure and unconstitutionally harass the Plaintiff ...

Paragraph Six:

(Thereafter the operating staff) decided to pursue a false charge against the plaintiff knowing it to be false ...

Paragraph seven:

(The operating staff) with the cooperation and assistance of the (board members) did bring such a false frivolous and baseless ... charge ... knowing it was false, baseless and invalid as a charge ...

Paragraph Ten:

(The operating staff and the "board" defendants) acted out of fraud and vicious malice, and likewise outside of any lawful authority they had.

Paragraph Eleven:

On May 8, 1981 (see C.) the charges referred to were dropped, dismissed, by a certain "Inquiry Panel" ... This was to the great surprise of every defendant, all Defendants having been intoxicated by their belief in the limitless power of the (operating staff and "board" defendants) to instill fear, silence and compliance in all attorneys.

Paragraph Fifteen:

> Further, the (operating staff and "board") defendants ... have succeeded in terrorizing the Plaintiff, so that he fears to re-enter the profession of law again since he would be in danger ..."

Paragraph Seventeen:

> The further method of illegal activity which the (operating staff and "board") defendants ... exercised and continued to exercise ...is an elaborate and secret system of surpressing and failing to process complaints against members of the bar whom they favor ... and they have used that power to bring the invalid charges which are the gravamen of this complaint against this Plaintiff ... and they have succeeded in silencing him ... by driving him out of the practice of law; he is duly terrorized, he does wish to go back to practice, he can stay in practice only if this suit succeeds."

The language quoted above is scarcely nonspecific nor conclusory, either as to conspiracy or as to actions. The Fourth

Circuit's finding that it is, is puzzling. It may be noted that the District Court did not base its decision on nonspecificity or conclusoriness.

F.

On the Constitutional Protections Requirement of Younger/Middlesex

Middlesex v. Garden State, supra, interprets Younger, supra. A federal court will abstain from interferring with a "disciplinary" committee

> "So long as the constitutional claims of the respondents can be determined in the state proceedings and so long as there is no showing of bad faith, harassment, (etc.) ..." 102 S.Ct. at 2523 of Middlesex.

The Petitioner contends that the Maryland Grievance Commission, after Pulliam has lost any claim to judicial immunity.

But even if it has not, the Petitioner

believes that the Court would be impressed, were certiorari granted and were the subject to be briefed, with the complete failure of the Maryland procedure to meet the tests of "constitutional claims can be determined" and "no bad faith or harassment". Partially Table A is already indicative of bad faith and harassment; while the procedure itself is so serpentine, monolithically controlled, comples, time consuming and expensive to any accused as to fall short of Due Prócess; ero "constitutional claims cannot be (<u>with reasonable, expeditious, Due Process</u>) determined." This is the procedure. References are to the Rule number. The Rules are found at A to A 49-57 :

> A. Complaint made. Followed up or dismissed without standards (BV6a2).
> B. Referred to a panel picked by a privy of The Bar Counsel (BV6a4) (BV6c)

Extended proceedings such as 4 to 6 weeks. No rules of evidence. No specific charges. Fishing permitted. Refusal to testify used against. No access to courts on constitutional matters has been available. (Reference: Practices not stated in the Rules.) C. Charges then forwarded to Review Baord, which acts (by practice, not rule) by one member reporting and other members voting on the report. No representation of accused. No chance to be heard. (BV6d4(b)). D. Forwarded to Court of Appeals. Specificity of charges required for the first time. (BV9a-c) Constitutional requirements not challengeable. (By practice, not Rule.) E. Forwarded to a "Master", not a judge (See Grievance v. Collins 457 A2d 134, 295 Md. 532. "Clearly erroneous" rule stated characteristic of a "Master" though performed by a "judge". The character of the proceedings is frequently obfuscated by terminology). "Trial" held. No access to constitutional challenge. Do rules of evidence apply? Case law unclear. F. "Exceptions" (not appeal) heard by Court of Appeals (BV11b2). Again, "clarly erroneous" rule mentioned. Trial is protracted. See Grievance v. Kerpelman 438 A2d 501. 45 trail days, 9 months.

This is no procedure. It is a barbed wire entanglement in no-man's land. Also believed demonstrable in a brief is the proposition that the Court of Appeals on "Exceptions" (Rule BV 11b2) regularly chooses to omit to even discuss important "exceptions" or to rule on them.

This Court might readily find, indeed, that the Maryland "disciplinary" Rules are

> "'flagrantly and patently' unconstitutional." Younger v. Harris 401 U.S. at 53.

Then the District Court should not have abstained.

IV

CONCLUSION

Pulliam Governs

The Fourth Circuit's consideration of the matter without reference to Pulliam, then, was erroneous. Its reliance on Younger v. Harris and on a "conclusory allegations" theory is not well founded. Declining to discuss Pulliam, as the Fourth Circuit did, does not make Pulliam go away. Abstention based on Younger, if that was the Fourth Circuit's ground, does not supravene Pulliam because Younger applies only to "ongoing prosecutions". The prosecution of the "grievance" against the Petitioner was entirely finished long before the suit below was filed. Equally, Younger, as stated in Middlesex, cannot apply if there is constitutional frailty or harassment. Any jury, or the court

sitting as trier of fact, could find that there was. It need not be reiterated that in the ruling on the motion below the allegations of the complaint were required to be taken as true. Nothing saves the case from being within the holding in Pulliam nor the Fourth Circuit from being in conflict with this Court.

Some General Considerations

What may be at stake in this case may be the very viability of the bar as a meaningful institution. This may appear alrmist, but until the Maryland system is acknowledged to be under some sort of constitutional containment rather than freed from it by an invalid application of "judicial immunity", one should be alarmed. Every flood starts with a shower somewhere and in Maryland, the river is

rising. The Maryland Court of Appeals, with its broad appointing power, controls the Grievance Commission, its operating staff, its Inquiry Panels, its Review Boards, the whole machiner. As could be shown in a brief, it is believed, the control is even more centralized than that. The staff has the power to make "investigations", and the unlimited power to not pursue any particular investigation. If it chooses to make an "investigation", then with more frequency than statistics would lead one to expect, these are against two suspect classes (Table A, A 36). Just as serious, these are without realistic checks and balances; the wishes of the appointing authority will almost always prevail. "Conformity" is therefore encouraged.

Vigorous, independent, and sometimes unpopular, advocacy is discouraged.

An institution without checks and balances is an institution which is tyrannical now, or will be tyrannical next year.

The Grievance Commission of Maryland is tyrannical, in fact, now. It will continue to be so unless it can be sued for recompense against its tyranny. Under the Civil Rights Act of 1963 Congress intended this. Under Pulliam v. Allen, this Court said just that: "Congress intended ... 1983 to be an independent protection for federal rights." In In re Ronwin, 113 Ariz. 357, 555 P 2d 315 (1976) referred to in Ronwin v. Arizona 52 LW at 4543, it was reiterated that practicing law is such a right.

The Fourth Circuit has become in conflict with the safe protection of that right by having placed itself in conflict with Pulliam.

Respectfully submitted

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EPILOGUE

The Unique Pursuit of This Petitioner

The last available published report of the Attorney Grievance Commission of Maryland covers the period July 1982 - June 1983. (Archive, Maryland Department of Legislative Reference, Baltimore.)

It indicates 1052 "processed" com-

plaints. Of these, 772 were busily dismissed as being "without merit" by the head of staff with the approval of one appointed selectee of an "Inquiry Committee". (Rule BV6a2 page A 53) No record of "dismissed" complaints is kept, and we cannot tell who the recipients of this kind treatment were. Again, we can only fall back on Table A (A 36).

In the period named; of the remaining 280 compalints not dismissed forthwith 125 "cases" seem to have been referred to Inquiry Panels. That is 12% of all complaints. The figures are hardly a paragon of clarity, and one is forced to guess at many meanings, (figures on A 47) but thereafter 53 "cases" seem to represent the suspension or ultimate serious stage of seeking disbarment through charges forwarded for a "trial", which is

the full conclusion permitted. This is This is but 5% of the cases, and perhaps fewer of the number of attorneys.

Yet, in the eight years (so that this is not some vagrant statistic, but a matter of policy), since the inception of its activity against the Petitioner, the Grievance Commission has never once ammarily dismissed a complaint against him. Not even the Oxley complaint. 100% have been forwarded along, and have each time been directed obstinately toward disbarment. Neither has the Commission ever referred any case against the Petitioner to fee arbitration as a mere fee dispute, or handled any in the other mollifying forms it has available. ("Counselling", private warning, etc.). Six

have been sent to Inquiry Panels (100%) including, of course, Oxley, and two new cases recently, which Petitioner believes are equally as frivolous in content. (1985 Docket of the Commission.)

On the other hand, for the twenty-eight years of his legal practice before 1978, during theperiod when regulation of the bar was in the hands of a cross-section of the bar itself by peer review, the Petitioner has not a single blemish on his ethical record. Something is amiss. Something even more serious, perhaps, within the state "disciplinary" system than is explained even by Table A. Something which is complex, which does not lend itself to the conciseness of a Petitioner, but which it is believed could be further

delineated in a brief. It would also appear, it is respectfully suggest, that there may exist, in the quiet and secret slaughters of "disciplinary" prosecutions --and non-prosecutions --in the Maryland system, a greater danger to the desreable ideals of the profession than has been generally suspected. It is a danger which Congress intended to guard against, by providing a means "to reach unconstitutional action by all state actors" (Pulliam at 4530) but which in this case, it is urged, the Fourth Circuit quite erroneously prevented any inquiry into.

Respectfully submitted,

LEONARD J. KERPELMAN

APPENDIX

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UNPUBLISHED

IN THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

No. 84-1737

LEONARD J. KERPELMAN,

Appellant,

vs.

MARVIN LAND, ET. AL.,

Appellees.

Appeal from the United States District Court for theDistrict of Maryland, at Baltimore, Joseph H. Young, District Judge. (C/A Y-83-3307)

Submitted: November 30, 1984

Decided: January 24, 1985

Before ERVIN and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

PER CURIAM:

Leonard Kerpelman appeals the district court's dismissal of his 42 U.S.C. § 1983 action against certain present and former members and employees of the Maryland Attorney Grievance Commission and a former judge.* Kerpelman, a Maryland attorney suspended for reasons not relevant to this appeal, alleged that the defendants conspired to deprive him of his first, fifth, and fourteenth amendment rights by pursuing a disciplinary charge that was eventually dismissed by an inquiry panel of the Commission. He sought damages and a permanent injunction prohibiting the defendants from pursuing any further "frivolous, fraudulent or insubstantial" complaints.

The district court held that each defendant subject to this appeal had either judicial or quasi-judicial immunity from

* The other defendants, those named in Kerpelman's group five, are not parties to this appeal.

damages. The court also held that the principles set forth in Younger v. Harris, 401 U.S. 37 (1971), rendered Kerpelman's request for injunctive relief inappropriate.

We affirm on the basis of the district court's opinion, noting additionally that Kerpelman's conclusory allegations of a conspiracy are insufficient to maintain his claim. See White v. Boyle, 538 F.2d 1077 (4th Cir. 1976); sigler v. LeVan, 485 F. Supp. 185 196 (D. Md. 1980). We also deny Kerpelman's motion for an injunction pendente lite.

AFFIRMED.

(Letter)

(4th Circuit Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1737

Leonard J. Kerpelman,

Appellant,

versus

Marvin Land, et al,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Ervin for a panel consisting of Judge Ervin,

Judge Chapman and Judge Butzner.

For the Court,

_____

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LEONARD J. KERPELMAN	*	
vs.	*	CIVIL NO.Y-83-3307
GROUP 1 DEFENDANT, MARVIN LAND, et al.	* *	

ORDER

In accordance with the attached Memorandum, it is this 17th day of April, 1984, by the United States District Court for the District of Maryland, ORDERED:

1. That the motions to dismiss filed by the "Group 1 Defendants" and the Groups Two, Three and Four" defendants BE, and the same ARE, hereby GRANTED;

2. That judgment BE, and the same IS, hereby GRANTED in favor of all defendants except Mr. Gail Oxley, Joann E. Oxley, and Mrs. Gail R. Oxley;

3. That the plaintiff show cause, if

any he may have, on or before the 17th day of May, 1984, why his cause of action filed against Mr. Gail Oxley, Joann E. Oxley, and Mrs. Gail Oxley should not be dismissed for failure to take affirmative steps to obtain service of process; and

4. That copies of this Memorandum and Order be sent to all parties.

/s/ Joseph Young
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LEONARD J. KERPELMAN	*	
vs.	*	CIVIL NO. Y-83-3307
GROUP 1 DEFENDANT, MARVIN LAND, et al.	*	

MEMORANDUM

The plaintiff, an attorney and former member of the Maryland Bar who has been suspended from practice for three years, has filed this 42 U.S.C. §§ 1983 action pro se against present and former members of the Maryland Attorney Grievance Commission, several employees and former employees of the commission, a former judge and the individuals who were involved in a complaint lodged against him. Currently before the Court are motions to dismiss filed by the Defendants.

The complaint basically sets forth a

claim of malicious prosecution. The Plaintiff maintains that the defendants instigated, prosecuted or sanctioned an investigation and inquiry into a patently meritless disciplinary charge against him. According to the complaint, the underlying allegation centered on statements made by the plaintiff that he represented two individuals whom he did not, in fact, represent. As exhibited by the attachments to the complaint, that charge was rejected as meritless by a unanimous decision of the"inquiry panel" appointed to conduct a hearing on the charge. The Plaintiff notes in his complaint that he has been suspended for charges "not related to this cause of action."

Before discussing the motions to dismiss, the Court should dispose of two preliminary matters. First, the plaintiff has

requested appointment of counsel. The Fourth Circuit has instructed the Court to appoint counsel only in exceptional cases, Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1974), and in this case the Court does not find such exceptional circumstances. Although the plaintiff is an attorney, (suspended from practice), his pleadings and affidavits will be construed under the less strict standards generally accorded pro se litigants who are not attorneys. Haines v. Kerner, 404 U.S. 519, 520 (1972).

The plaintiff also has requested a hearing on the motions to dismiss. However, after reviewing the submissions of the parties, the Court has concluded that a hearing is/~~un~~necessary, since the allegations of the plaintiff in his complaint make clear that he could prove no set of facts entitling him to relief.

The plaintiff, in his complaint, has separated the defendants into five different groups. Defendants listed in the first four groups are entitled to judicial or quasi-judicial immunity from damages, and injunctive relief would be inappropriate. One member of the fifth group of defendants, has requested dismissal because the plaintiff has failed to serve her within 60 days of filing this action. A Show Cause Order will be signed with regard to her and her co-defendants. Each group of defendants will be discussed in turn.

DEFENDANT MARVIN LAND

According to the complaint, Marvin Land was a judge of the Circuit Court of Baltimore County, who resigned from the bench to take a job with a Baltimore City law firm. The plaintiff claims that Land, acting "entirely outside the bounds of any

duty or the duties of any elected office he then held, andentirely and solely out of vicious malice, jealousy and/or rage," instituted the charge against him. The attachments to the complaint indicate that the charge on which the plaintiff bases his claim originated with a motion for a protective order filed by the plaintiff on behalf of the mother and brother of a client, in response to deposition notices from those individuals. The attachments to the complaint show that the investigation by the Maryland Attorney Grievance Commission was "into whether... you (the plaintiff) made a false representation to Marvin Land when you indicated that you represented Mrs. Oxley's mother and brother-in-law (sic, should read 'Mr. Oxley's mother and brother') when in fact you knew that you did not represent them."

The scope of judicial immunity under § 1983 was explored thoroughly by the United States Supreme Court in Stump v. Sparkman, 435 U.S. 349 (1978). In Stump, the victim of an involuntary sterilization filed an action against her mother, who had instituted the petition which resulted in her sterilization, against her mother's attorney, against the surgeon and other medical personnel, and against the judge who signed the order allowing the sterilization to proceed. The court noted that judicial immunity was held to apply to § 1983 actions in Pierson v. Ray, 386 U.S. 547 (1967), and cited with favor the earlier explanation of the scope of judicial immunity in Bradley v. Fisher, 13 Wall. 335, 351 (1872):

> ... judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. 435 U.S. at 356.

The Stump court noted that:

> A judge will not deprived of immunity because the action he took was in error, was done maliciously, or was in excess of her authority; rather, he will be subject to liability only where he has acted in the "clear absence of all jurisdiction." Stump at 356-57.

Thus, the Court must answer two questions in determing whether former Judge Land is immune from actions for damages under § 1983: first, whether the actions he is accused of having taken are "judicial acts," and second, whether or not those actions "fall clearly outside his jurisdiction" as a judge. Harper v. Merckle, 638 F.2d 848, 858 (5th Cir. 1981). The Fifth Circuit listed four factors which a court should apply in determining whether or not a judge's actions were "judicial acts," particularly in the context of contempt proceedings. These factors include whether:

1) the precise act complained of... is a normal judicial function;

2) the events involved occurred in the judge's chambers;

3) the controversy centered around a case then pending before the judge; and

4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity.

Applying those facts to the acts which the plaintiff complained of -- that of filing or encouraging a disciplinary charge against the plaintiff -- it is clear that such an act, while not a frequent judicial act, is part of the judicial function of monitoring the behavior of attorneys before the court. The underlying event occurred in the judge's chambers, centered around a case then pending before the judge, and arose directly and immediately out of business, not social, interactions between the plaintiff and the judge.

As to the question of jurisdiction, the Maryland courts have held tenaciously to their

authority and their responsibility to regulate members of the legal profession.

> In light of the intimate relationship between the learning and character of attorneys, the perceptions of the public, and the performance by the courts of their constitutionally assigned functions, we are confident that, as a general matter, the proper repositiry for the authority, responsibility and obligation to regulate the profession, in our scheme of constitutionally divided realms of power, is and must ultimately be the judiciary of the state. Attorney General v. Waldron, 289 Md. 683, 697-98 (1981).

The plaintiff argues that defendant Land's claim of judicial immunity is equivalent to a claim of

> judicial civil immunity interposed if he had run over a citizen who had the green light in a crosswalk while Land was on the way to the courthouse. Or ... a citizen stands below Land's window at the courthouse and yells "Justice Sucks Here!" Land opens the window and throws

> a heavy paperweight at the citizen, fracturing his skull. (Document 6 at page 3).

Although the similarities between plaintiff's examples and the allegations against defendant Land may be apparent, throwing an ashtray or disobeying a traffic signal is not a "judicial act" subject to the immunity established in § 1983 cases.

This Court finds that defendant Land's initiation of the complaint against the plaintiff was a judicial act and was within the jurisdiction of the court, and is, therefore, not actionable under the doctrine of judicial immunity.

PRESENT AND FORMER MEMBERS AND EMPLOYEES OF COMMISSION

With the exception of the Oxleys, who are alleged to have provided the "false" information on which the "phony" charge was based, the remaining defendants are all

present or former employees or members of the Attorney Grievance Commission of Maryland. Having determined that Judge Land is immune from suits for damages under § 1983, the Court must determine whether the acts of the Commission and its agents are entitled to "quasi-judicial" absolute immunity as the arm of the judiciary, charged with regulating attorney conduct in Maryland.

A survey of the relevant case law shows that the courts of appeals of the District of Columbia Circuit and the Fifth, Sixth, Seventh, Eight, Ninth and Tenth Circuits have all determined that the members and/or agents of analogous commissions are absolutely immune from suits for damages under § 1983 or other federal laws. Only one circuit --the Second Circuit --has held in a somewhat dated opinion that there are some circumstances (notably, those involving

restrictions on First Amendment freedom of speech) in which absolute immunity should not be granted to attorney grievance commissions. Although the Fourth Circuit has not ruled on this issue, and although the plaintiff here has claimed interference with freedom of expression, this Court finds the majority rule more persuasive under these circumstances, and holds that the Maryland Attorney Grievance Commission and its lawful agents are absolutely immune from suits for money damages for acts committed in the course of their duties.

The rationale of granting absolute immunity to attorney disciplinary committees is basically that they are the "arm of the cours," Simons v. Bellinger, 643 F.2d 774, 780 (D.C. Cir. 1980), or that they are "an integral part of the judicial process," Clark

v. State of Washington, 366 F.2d 678, 681 (9th Cir. 1966). See also Slavin v. Curry, 574 F.2d 1256, 1266 (5th Cir. 1978). They have been compared with public prosecutors, who receive absolute immunity for their quasi-judicial functions such as determining whether to proceed with a criminal prosecution but only qualified immunity for police-like or investigative functios. Kissell v. Breskow, 579 F.2d 425, 430 (7th Cir. 1978). Those courts which have examined the issue have held that the attorney disciplinary commissions and their agents are entitled to absolute immunity becasue their activities are more like the discretionary functions of prose-cutors than the ministerial, investigative functions of police departments. See, e.g., Kissell, 579 F.2d at 430; Simmons, 643 F.2d at 780. Having reviewed the decisions, the

Tenth Circuit stated:

> ... we... agree with the courts which have held that bar officials charged with the duties of investigating, drawing up, and presenting cases involving attorney disciplinary enjoy absolute immunity from damage claims for such functions. Clulow v. State of Okla, 700 F.2d 1291, 1298 (10th Cir. 1983). Accord, Ginger v. Circuit Court for County of Wayne, 372 F.2d 621, 625, cert. denied, 387 U.S. 935 (6th Cir. 1967), Rhodes v. Meyers, 334 F.2d 709, 718, cert. denied, 379 U.S. 915 (8th Cir. 1964).

The case decided by the District of Columbia Circuit is closely analogous to the one brought by Kerpelman. There, as here, the plaintiffs allege that the defendants -- members of the disciplinary committee involved -- "maliciously harassed" them. The court held that the defendants were absolutely immune because their work resembled that of a prosecutor, as well as

that of a judge.

> Having genuinely focused upon particular defendants and a particular wrong, the Committee is entitled to absolute immunity when it makes inquires necessarily antecedent to its determination regarding prosecution ... .
>
> The Committee members' work is functionally comparable to the work of judges in a second respect. They serve as an arm of the court and perform a function which traditionally belongs to the judiciary. 643 F.2d at 780. ...

As mentioned, only one court has held that an attorney disciplinary committee does not enjoy absolute immunity from suits for money damages. In Dacey v. New York County Lawyers' Assn., 423 F.2d 188, cert. denied, 398 U.S. 929 (2d Cir. 1969), the court held that, where First Amendment interests were implicated, those serving on a disciplinary committee are netitled to only qualified --or "good-faith" --immunity for their acts.

> We are of the view that when the (New York County Lawyers') Association instituted its proceedings against Dacey, its role was analogous to that of a public prosecutor. But this is not the end of our inquiry. Chief Judge Learned Hand concluded that the decision to grant immunity to public prosecutors arose from "a balance between the evils inevitable in either alternative." . . . In analyzing those interest, we discern facets to this case which cause us to pause and question the wisdom of allowing the Association to find sanctuary in the doctrine of immunity on the facts alleged in the complaint.
>
> The objective and effect of instituting criminal contempt proceedings for the unauthorized practice of law against Dacey was to suppress a book . . . 423 F.2d at 192.

The district court's entry of judgment for the defendants in the Dacey case was affirmed, however, because the Second Circuit determined that probable cause existed to prosecute the complaint against the plaintiff, and therefore, the Association was

entitled to "good-faith" immunity from money damages.

As stated earlier, Kerpelman has alleged that there were First Amendment overtones to the prosecution of the complaint against him. He maintains that members of the Attorney Grievance Commission were aware of an article he published critical of the courts and the organized bar, and that the pursuit of the charges against him was motivated by the bar's desire to suppress such criticism. However, such an allegation does not remove the immunity from the members and employees of an attorney disciplinary committee. In Maryland, as in other states, judges have delegated the functions of investigating and prosecuting complaints of misconduct against attorneys to the Maryland Attorney Grievance Committee, Kerpelman v. Bricker, 23 Md. App. 628, 630

(1973), and in pursuing those complaints, the individuals on the committee and its agents are acting as judicial agents. Just as judges are granted absolute immunity for money damages for judicial acts within their jurisdiction -- regardless of First Amendment overtones -- so must their agents.

INJUNCTIVE RELIEF

The remaining question with regard to all defendants except those listed in "Group Five" is whether the plaintiff has stated a cause of action with regard to the declaratory and injunctive relief he seeks. Basically, the plaintiff claims that the "false" and "ridiculous" charge lodged against him and then dismissed by the inquiry panel was an indication of a pattern of harassment against him which will continue if he "re-enters the profession of law." There is no

claim of any pending disciplinary action against him. He also maintains that this campaign of harassment has been pursued against him "to suppress free speech, dissent, and just criticism."

The plaintiff also claims that the defendants should be enjoined because they have deprived him of his "Fourteenth Amendment right to practice" without due process of law. His claims with regard to disciplinary proceedings resulting in sanctions are not appropriately before this Court. The courts have held that a § 1983 action will not lie for successful disbarment proceedings, since the appropriate avenue for appeal is by writ of certiorari to the United States Supreme Court. Coogan v. Cincinnati Bar Ass'n., 431 F.2d 1209, 1211 (6th Cir. 1970).

However, dismissing the plaintiff's

allegations with regard to the due process claim does not require dismissal of this entire suit. The claim with regard to the "harassment" campaign remains.

The Supreme Court recently noted the cloase similarity between criminal prosecutions and disciplinary actions against attorneys, Middlesex Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423, 432-33 (1982), and held that the principles espoused in Younger v. Harris, 401 U.S. 37 (1971), with regard to federal court injunctions against state criminal prosecutions will be applicable to federal courts' handling of injunctions against state disciplinary proceedings. Although Younger and its progeny express a general rule disallowing federal court interference with state prosecutions, an express exemption was made by the Court in Younger

for situations where a pattern of prosecutions for harassment purposes was alleged. See401 U.S. at 48, citing with favor Dombrowski v. Pfister, 380 U.S. 479 (1965). As noted, t the plaintiff here has made such an allegation.

To demonstrate a pattern of malicious prosecutions capable of invoking the federal court's injunctive powers, a plaintiff must be able to show that prosecutors have engaged in such a stream of activity without "any expectation of securing valid convictions." Dombrowski, 380 U.S. at 482, cited in Younger, 401 U.S. at 48. The circumstances, on the face of the complaint, indicate otherwise. Here, the plaintiff was, in fact, suspended from practice for a period of three years for two separate complaints (the final results are reported at Attorney Griev. Comm'n v. Kerpelman, 288 Md. 341, 383 (1980), cert.

denied, 450 U.S. 970, and at Attorney Griev. Comm'n v. Kerpelman, 292 Md. 228, 245 (1981)). As a result, the campaign of harassment alleged by Kerpelman can hardly be said to have been engaged in without hope of successful prosecution, and his allegations must be dismissed.

FAILURE TO SERVE

One of the "Group Five" defendants, Gail R. Oxley, on March 27, 1984, moved the Court to dismiss the cause of action filed against her because she has not been served with process. A review of the file indicates that the plaintiff requested the clerk to withhold service, presumably because of the cost, but that he has not served any of the Group Five defendants, including Mr. Gail Oxley, his wife, Joann E. Oxley, or the movant, Mrs. Gail R. Oxley.

Although the Court has serious dobts that the Oxleys' alleged activities could be construed to have been "under color of state law" to state a § 1983 claim, the defendant's motion for dismissal cannot be granted at this time. Rule 33(B) of the Rules of the United States District Court for the District of Maryland requires the Court to grant the plaintiff a period of time to show cause why it should not dismiss the action against those defendants who have not been served within 60 days of filing the complaint. Accordingly, a Show Cause Order will be signed with regard to the "Group Five" defendants.

/s/ Joseph Young
United States District Judge

(Letter)

August 28, 1984

Re: 84-1737, Leonard J. Kerpelman
vs. Marvin Land, et al

Dear Counsel and Mr. Kerpelman:

The Court is in receipt of the parties' informal briefs in this case. After reviewing the record, it has been determined that additional briefing would be of assistance in resolving this appeal.

I have been directed to request that the parties file briefs on the following issues:

(1) Whether members of Attorney Grievance Commission of Maryland are absolutely immune from suits for money damages.

(2) Whether in light of Pullian v. Allen, _____, U.S. _____, 52 U.S. L.W. 4525 (May 14, 1984), appellant's request for injunctive relief and costs was properly denied.

Appellant shall serve and file his brief on or before September 24, 1984, and appellees' brief shall be served and filed within 30 days of service of appellant's brief. Each party may file their own appendix, along with their brief containing such materials as they deem necessary to a full understanding of the matters being

presented.

Sincerely yours,

JOHN M. GREACEN

By:
Scott A. Richie
Counsel for Clerk's Office

SAR:zyj

May 8, 1981

Suite 1504
201 North Charles
Street
Baltimore, MD.21201

Melvin Hirshman, Esquire
Bar Counsel
Attorney Grievance Commission
of Maryland
District Court Building
Taylor Avenue and Rowe Boulevard
Annapolis, Maryalnd 21401

(cont.)

Re: Leonard J. Kerpelman
BC Docket No: 80-39-4

Dear Mr. Hirshman:

With reference to the above-captioned matter, it is the unanimous decision of the Inquiry Panel appointed to review this matter, that this complaint should be dismissed without a hearing pursuant to Rule BV6d4(a). The panel, after a complete review of the file, found no violations of any of the Rules in the Code of Professional Responsibility.

It was further determined that there was no conscious and/or willful desire exhibited on the part of the Respondent to make any misrepresentations to the Court in this matter. The Panel found that that the Respondent was justified in thinking that he was going to represent Ms. JoAnne Oxley's in-laws. Ms. Oxley's letter of July 23, 1980 is an admission on her part that Mr. Kerpelman was led to believe that he was going to present her mother-in-law. Her letter states in part, "At the beginning of our conversation with Mr. Kerpelman,

I indicated to him in general sort of way that if anything came up that involved my mother in law that it should be included in our bill."

It was further found by the Panel that Mr. Kerpelman had a legitimate conflict in his schedule on that date that the depositions in question were scheduled. Subsequent to the filing of the Motion for Protective Order, opposing counsel did agree that the deposition would be postponed.

Very truly yours,

Roslyn Soudry
Chairman, Inquiry Panel

RS/amk

EDWARD SMITH, JR.
222 St. Paul Street
Suite 3600
Baltimore, Maryland 21202

RONALD S. WADE
36 S. Paca Street
Apt. 611
Baltimore, Maryland 21201

(Holographically at bottom of second page):

Aug. 19:

Ed Smith "It was a piece of (expletive)" (!)

"Unanimously dismissed."

That was when I called Roslyn Soudry and asked for a copy which Hirshman had already refused.

MARYLAND GRIEVANCE COMMISSION CASES NOT BASED
ON CRIMINAL CONVICTIONS OR ALCOHOLISM

Names Probably Jewish Ethnic[1]	Names Probably Not Jewish Ethnic[2]
21	40
Defendant A Member of A Small Firm or A Sole Practitioner[3]	Defendant A Member of A Large Firm[4]
60	1

---

1 The names: Askin, Burka, Cooper, Demyan, Engerman, Frank, Freedman, Goldberg, Kahn, Kerpelman, Leventhal, Levitt, Morris, Nothstein, Pollack, Robinson, Rosen, Samstag, Sherman, Swerdloff, Weiss.

Note: We can each make our own practised judgments as to which names are and are not Jewish ethnic. It is suggested that it is a common enough American game-of-skill as to have achieved social and perhaps even anthropological acceptance among us. Petitioner happens to believe that this game of "roots," as it were, constitutes not only an acceptable, but an important field of enquiry in this case. Certainly this is true as to the Large-Firm Small-Firm categorization.

TABLE A

2

Agnew(yes, he.), Babbit, Bailey, Baker, Boehm, Collins, Crowther, Deutsch, Dunphy, Finnesey, Flynn, Garson, Hall, Harrison, Hegnze, Howard, Haupt, Hohenberger, James, Lockhart, McBurney, McIntire, Mason, Marano, Montgomery, O'Niell, Phoebus, Powers, Silk, Sheehy, Sinclair, Sperling, Stancil, Stewart, Strathen, Thorup, Truette, Wilcher, Woodward, Willemain.

3

Petitioner recognizes only one name as an inhabitant of a Large Firm. While he is not entirely certain of his classification skill here, he is sure the Respondents will correct him if there is an error.

4

Nothstein, Esq., a member of Baltimore's largest Large Firm, Venable, Baetjer and Howard. However, according to the reported case, his fall from grace was for a $40,000 money defalcation against the firm. A matter of some considerable creative work with false expense account vouchers. Enough, apparently, to outrage even Venable, Baetjer and Harris. 480 A.2d 807, 300 Md 667. As to a count showing Venable, Baetzer and Howard's size, reference is to Martindale-Hubbell.

July 26, 1979

John E. Raine, III, Esquire
405 W. Pennsylvania Avenue
Towson, Maryland 21204

RE: OXLEY V. OXLEY
Equity 92369

Dear Mr. Raine:

In regard to the Notices to Take Deposition of Mr. Carl Oxley and Mrs. Gail R. Oxley which you have arranged for August 6, 1979, unfortunately on August 6, 1979, I have a previously scheduled merits hearing inthe Circuit Court for Carroll County, in the case of Barnett v. Barnett.

I am therefore unable to attend the depositions above and ask that you contact my office to arrange a mutually agreeable date for the taking of these depositions.

Thank you.

Very truly yours,

Leonard J. Kerpelman

LJK/bg
cc: Clerk of theCourt
MR. CLERK: Please file copy of this letter in Court file.

August 9, 1979

Hon. Marvin J. Land
Circuit Court forBaltimore County
Courthouse
Towson, Maryland 21204

RE: OXLEY V. OXLEY
Equity 92369

Dear Judge Land:

This is in reply to your letter of August 2nd.

Some time ago, my client Mr. Gail Oxley, and his present wife Joanne indicated to me that in the event that a deposition should be proffered to be taken of Mr. Oxley's parents, that they had arranged with Mr. Oxley's parents that I would represent them at that deposition.

Therefore, when I received notice of this deposition, I made several calls attempting to confirm this with Mrs. Oxley, but we were unsuccessful in making contact. I called her approximately four times, she called me approximately two times and we missed each other.

I have no reason to assume, since this is a close family, that the plans for my representing Mr. & Mrs. Oxley's parents at the deposition had at all been changed and therefore filed a Motion for Protective Order since I had a schedule conflict on that day.

When I finally did reach Mrs. Oxley, to my considerable surprise, she equivocated about whether she wanted me to represent her or not, and I therefore promptly called Mr. Raine, and told him that I was not representing Mrs. Oxley and that there should therefore be no problem about his taking her deposition or that of Mr. Earl Oxley.

If you have any other questions I will be glad to answer them for you.

Very truly yours,

Leonard J. Kerpelman

LJK/bg

cc: John A. Raine, Esquire
Gregory J. Olsen, Esquire

Office - Supreme Court
FILED
JUN 24 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LEONARD J. KERPELMAN,

Petitioner,

v.

MARVIN LAND, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN H. SACHS,
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*DIANA G. MOTZ,
PETER E. KEITH,
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Attorneys for Respondents.

*Counsel of Record

BEST AVAILABLE COPY

15 pp

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the District Court and Circuit Court properly hold that Respondents are entitled to judicial and quasi-judicial immunity from Petitioner's claim for damages, and that Petitioner failed to state a valid claim for injunctive relief, thereby warranting dismissal of Petitioner's 42 U.S.C. §1983 action?

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No. 84-1822

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LEONARD J. KERPELMAN

Petitioner

v.

MARVIN LAND, et al.

Respondents

On Petition for Writ of Certiorari
To the United States Court of
Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Petitioner Leonard J. Kerpelman (hereinafter "Kerpelman"), an attorney currently serving a disciplinary suspension from the

practice of law in the State of Maryland, filed a 42 U.S.C. §1983 civil action against five "groups" of defendants in U.S. District Court for the District of Maryland on October 14, 1983.

In his complaint, Kerpelman contended that defendants conspired to file and pursue "a false and entirely frivolous charge of professional misconduct" against him. Prior to Kerpelman's suit, the misconduct charge at issue had been unanimously dismissed by an Inquiry Panel of the Attorney Grievance Commission of Maryland at a preliminary stage without a hearing, and no sanction was sought or imposed. See Maryland Rules BV5 and BV6, reproduced in Pet. App. at 50-55, outlining procedures before the Attorney Grievance Commission. Nevertheless, in his §1983 complaint Kerpelman demanded damages and an injunction against possible future action

which the Attorney Grievance Commission might take against him.

Defendant Marvin Land, a former Circuit Court Judge for Baltimore County, Maryland and a Respondent before this Court, moved to dismiss Kerpelman's §1983 complaint on the basis of judicial immunity. The other Respondents before this Court - the present Bar Counsel of the Attorney Grievance Commission of Maryland, former Assistant Bar Counsel, and present or former members and employees of the Attorney Grievance Commission - moved to dismiss Kerpelman's §1983 complaint for a variety of reasons, including quasi-judicial immunity.

In a lengthy Memorandum opinion filed on April 17, 1984, the Honorable Joseph H. Young of the District Court dismissed Kerpelman's claims for damages on grounds of judicial and quasi-judicial immunity. The District Court also dismissed Kerpelman's claim for injunc-

tive relief for failure to state a claim upon which relief may be granted. Pet. App. at A8-A30. In an unpublished Opinion dated January 24, 1985, the Court of Appeals for the Fourth Circuit affirmed on the basis of the District Court's opinion, noting additionally that Kerpelman's conclusory allegations of a conspiracy were insufficient to maintain his claim. Pet. App. A1-A3. By Order dated February 20, 1985, the Court of Appeals denied Kerpelman's petition for rehearing en banc. Pet. App. A4-A5.

REASONS FOR DENYING THE WRIT

1. The Trial and Appellate Courts Fully Considered and Correctly Decided the Question Presented.

After thorough analysis, the District Court correctly determined that Respondent Land's initiation of the grievance complaint against Kerpelman was a judicial act subject

to judicial immunity from claims for damages. Stump v. Sparkman, 435 U.S. 349 (1978).

The District Court also properly found that the remaining Respondents before this Court, all of whom are present or former members or employees of the Attorney Grievance Commission of Maryland, are entitled to quasi-judicial absolute immunity from claims for damages as the arm of the judiciary charged with regulating attorney conduct in Maryland. Pet. App. A17-A25. See Butz v. Economou, 438 U.S. 478 (1978). The District Court's decision on this point was in part based upon several Court of Appeals decisions granting absolute immunity to attorney disciplinary commissions and their agents who investigate and prosecute complaints of misconduct of attorneys. On appeal, the Fourth Circuit concurred with the District Court's conclusion and reasoning.

The trial and appellate courts also properly held that Kerpelman's complaint failed to state a valid claim for injunctive relief, because his conclusory allegations were insufficient. Pet. App. A3, A10. Indeed, dismissal of Kerpelman's injunction claim was entirely proper, since he cannot show a real and immediate threat of future injury by Respondents, a necessary prerequisite to stating a claim for injunctive relief. City of Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 1668 at n. 8 (1983).

The lower courts also correctly noted that Kerpelman's prayer for injunctive relief with regard to possible future investigations of him by the Attorney Grievance Commission would interfere with the principles of federal-state comity set forth in Younger v. Harris, 401 U.S. 37 (1971), and Middlesex Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423 (1982). Accordingly, Kerpelman's

claim for injunctive relief was properly dismissed.

In his Petition for Writ of Certiorari, as he did in briefing before the Fourth Circuit, Kerpelman suggests that dismissal of his request for injunctive relief somehow contradicts the decision in Pulliam v. Allen, _____ U.S. _____, 104 S.Ct. 1970 (1984). In Pulliam, this Court held that the doctrine of judicial immunity does not bar a §1983 action seeking injunctive relief and attorneys' fees.

Had the District Court in this case dismissed Kerpelman's request for injunctive relief on immunity grounds, Pulliam might compel a remand. However, this did not occur. Ratner, Kerpelman's claim for injunction and attorneys' fees was dismissed for failure to state a claim upon which relief could be granted. Accordingly, Pulliam has

no application to this case, and Kerpelman's reliance upon Pulliam is wholly misplaced.

2. The Question Presented Is Particularly Fact-Specific and Not Important Enough to Warrant Review.

Kerpelman's continual dispute with the Attorney Grievance Commission of Maryland is admittedly "unique." Pet. at 49. The District Court's ruling, as affirmed by the Court of Appeals, is fact-specific and necessarily rooted to the peculiar allegations set forth by Kerpelman in his complaint. Moreover, Kerpelman's unusual complaint does not present a substantial federal question worthy of this Court's review, because the charge of misconduct at issue was dismissed by an Inquiry Panel of the Attorney Grievance Commission prior to Kerpelman's lawsuit and without a hearing or imposition of any penalty. Under these circumstances, this Court should decline further review of the matter.

3. The Second and Third Questions Raised in the Petition Are Not Properly Before the Court.

In his Petition, Kerpelman apparently seeks this Court's consideration of questions dealing with "repression of Free Speech" and alleged selective prosecution of certain groups by the Attorney Grievance Commission. Pet. at IV. Because these questions were not presented to the lower courts for consideration, review of these issues by the Court would be inappropriate.

CONCLUSION

Respondents respectfully urge the Court to decline to review this case by the issuance of a Writ of Certiorari. The question raised by the Petition was correctly decided at both the trial and appellate levels, and is not an issue worthy of further consideration by this Court. The additional questions

presented by the Petitioner are not properly before the Court.

Respectfully submitted,

STEPHEN H. SACHS
Attorney General of Maryland

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